UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

Aerotek, Inc.

Employer[1]

and **Case 17-RC-077754**

International Brotherhood of Electrical Workers Local 22

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer is a temporary personnel and job screening agency that refers employees and candidates to business enterprises, including enterprises engaged in the construction industry. The Employer provides these personnel services in various locations in a number of states, including from its office located in Omaha, Nebraska (Employer's facility), the only facility involved here. The Petitioner filed a petition[2] with the National Labor Relations Board (the Board), under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a unit of all electricians, journeymen, and apprentices in the construction field employed out of the Employer's Omaha facility, excluding supervisors and low-voltage technicians.

A hearing officer of the Board held a hearing, and the parties waived briefs but made oral arguments, which I have carefully considered.

The Petitioner contends that since it was the Employer's commission of unfair labor practices that blocked the petition until the current time, the eligibility period for an election in this matter should be the time that the petition was filed in March 2012. The Employer contends

[1] The Employer's name appears as stipulated at hearing.
[2] The Petition was filed on March 30, 2012 and then blocked pending the disposition of unfair labor practice charges filed by the Petitioner against the Employer. The unfair labor practices having been disposed; processing of the petition was reinstated.

that the petition should be dismissed because during at least the last 3 years, it has not hired or placed for hire any employees that would fall within the petitioned-for bargaining unit, and thus, there are no employees who would qualify under the *Daniel/Steiny* formula used in determining voter eligibility in the construction industry. See, *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NRLB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323, 1327 (1992).

As discussed more fully below, I conclude that for the past 3 years, the Employer has not employed, referred, or placed for employment any employees as defined in the petitioned-for bargaining unit, and as such, the Employer employs no employees who meet the *Daniel/Steiny* formula for eligibility. Therefore, I am dismissing the petition.

I. STATEMENT OF FACTS

The Employer provides temporary personnel and job screening services to business enterprises in various industries, including the construction industry, in various locations in a number of states, including the Employer's facility in Omaha, Nebraska.

The Employer provides 3 types of employment services: contract for hire, temporary contract, and direct placement. Ninety percent of the Employer's services are contract for hire, and five percent each for temporary contract and direct placement. In contract for hire services, customers will seek the Employer's services to fill a single position or workforce for a specific job or location. The Employer will determine the requirements of the job, find candidates either through recruiting or from its current database, hire the candidate, and place them on the customer's job site. The Employer employs and pays the employee while working on the

customer's site and then, after a certain amount of time, usually pre-set, the customer can hire the employee permanently as its own employee and the Employer's involvement ends.

In temporary contract services, the customer will ask the Employer to find candidates for a certain job or location for a temporary job, the length of which is usually pre-set. The Employer will determine what the job requires, find candidates, and hire them assigning them to the customer's facility. The employee remains employed by the Employer during the entire length of the temporary assignment to the customer.

Direct placements are situations when the customer requests the Employer find candidates for a specific position and refers them to the customer for interview and hire. If the referred candidate is hired, the Employer receives a one-time fee from the customer and the Employer's role ends. The employee is never employed by the Employer and the Employer has no role in the decision to hire or the setting of the employee's terms and conditions of employment.

In all 3 types of job placement, employees/candidates referred by the Employer are assigned job codes based on their skills, knowledge, abilities, and experience. A candidate once placed in the Employer's database remains and may be sent to customers numerous times. A candidate may also be assigned a variety of job codes depending on the variety of skills, knowledge, abilities, experience, and job preferences of each person. When a customer requests a referral, the Employer will search its database by inputting various job codes that relate to the job requirements sought by the customer.

In addition to providing referral services for electricians in the construction industry, the Employer also places electricians in maintenance and industrial positions, which are not considered construction industry work. Maintenance electricians typically maintain equipment in a manufacturing or industrial setting. Other low-voltage electrical work, which is not in the petitioned-for bargaining unit, may include pulling of cable.

In preparation for this hearing, the Employer's construction industry account manager, with the assistance of the Employer's comptroller, reviewed its records for the past 3 years for any placements of journeymen or apprentice electricians to construction industry jobs. This search included any job codes related to electrical work. The Employer's database search found only one journeyman electrician placed in the last 3 years, but that placement was to a non-construction industry customer performing work at a third-party's site. The customer's request was for a contract to hire an Electrical and Instrumentation Technician responsible for the commissioning and maintenance of electrical instrumentation at the customer's client's facility. The required enterprise skills were knowledge of instrumentation, controls, apprentice, high voltage, journeymen, electrical, pressure, flow, temperature, and level. The top skills were instrumentation, process controls, apprentice, and journeyman. The account manager uncontrovertibly testified that this job was not a construction industry position and that no construction work was occurring at the job site. The employee hired for the position started on April 30, 2018, and that the employee left on his own accord in August 2018. The account manager testified that the lack of hiring of electricians in the construction industry was the result of a trend and not because the Employer failed to recruit for those positions. The account

manager did testify that its database search found that in the past 3 years, the Employer had referred two low-voltage electricians. Low-voltage electrical work which might occur on a construction site could include pulling of cable or wire, but is specifically excluded from the petitioned-for bargaining unit.

II. ANALYSIS

I agree with the Employer's contention the petition should be dismissed because it has not referred or employed any journeyman or apprentice electricians to a construction industry position who would meet the *Daniel/Steiny* voter eligibility standards set forth for the construction industry.

Under the *Daniel/Steiny* formula, employees are eligible to vote if they have been employed in the unit for a total of 30 working days or more within a period of 12 months immediately preceding the eligibility date of the election, or who have some employment in the unit in that period and have been employed 45 working days or more in the unit within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Daniel Construction Co.,* supra; *Steiny & Co., Inc.,* supra.

Here, the record evidence is undisputed. The Employer has not referred a journeyman or apprentice electrician to a construction industry job in the past 3 years and the petitioned-for unit specifically seeks only construction industry electricians, excluding low-voltage technicians. The one journeyman electrician the Employer has referred was to a non-construction industry

position, thus he was not performing bargaining unit work as sought by the petition. Moreover, he was only employed for approximately 3 months in 2018 and he was the sole journeyman electrician referred by the Employer. If he had been performing construction industry work, he may have met the second prong of *Daniel/Steiny* formula, working 45 days or more within the preceding 24 months immediately preceding the election. However, the referred journeyman would have been the sole unit employee where the remainder of the only other potentially related electrical-related work for which the Employer did make two referrals in the last 3 years, were both for low-voltage electrical work, which is work that the Petitioner specifically excluded from the petitioned-for bargaining unit.

The Petitioner asserts that the eligibility date should coincide with the initial filing of the petition in March 2012. This argument is based on the Petitioner's contention that the Employer should not be able to benefit from its commission of unfair labor practices and the long period of time it took to dispose of them. The Petitioner relies on the holding in *Tekweld Solution's, Inc.,* 361 NLRB 201 (2014), where the Board rejected the employer's argument that the Acting Regional Director should have sua sponte revised the March 2013 eligibility date to accord with the revised November 2013 election date. The holding in *Tekweld* is distinguishable from the facts here.

In *Tekweld,* the petitioner filed its representation petition on March 5, 2013. On March 21, 2013, the parties entered into a stipulated election agreement with a set eligibility date of March 8 and an election on April 16, 2013. The election was blocked after the petitioner filed unfair labor practice charges against the employer, a complaint issued, and a hearing was held.

On August 30, 2013, the parties entered into a settlement agreement and further agreed the election would be held as soon as possible after the specified posting-period of the settlement agreement. The election was finally held on November 19, 2013, using the eligibility period agreed to in the March 21 stipulated election agreement. The election results were 21-20 for the petitioner with 30 challenged ballots. Twenty-four of the challenges were made by the Board agent because their names did not appear on the eligibility list. Twenty-three of the employees challenged were hired after the eligibility date. The employer argued that the Acting Regional Director should have revised the eligibility date to accord with the revised election date. The Board rejected the employer's argument because the employer failed to raise its concern in a timely manner prior to the election. The Board also rejected the employer's concerns because the Board's Casehandling Manual [3] provides: 1) that the eligibility date should be the last payroll period ending before the Regional Director's approval of the stipulated election agreement; 2) employers are not required to provide a second list of names and addresses for rescheduled elections, absent unusual circumstances; and 3) there is no indication that a Region should, of its own accord, change a stipulated eligibility date where the initial election has been delayed due to blocking charges.

Here, unlike in *Tekweld,* the parties never entered into an election agreement setting an eligibility period due to the filing of unfair labor practice charges which blocked the March 30, 2012 petition. Those unfair labor practices from 2012 were not resolved until recently and the

[3] See Casehandling Manual (Part Two) Representation Proceedings (Casehandling Manual) Sections 11086.3, 11312.1(j)

petition process was resumed. Thus, there is no agreed upon eligibility date upon which the Acting Regional Director can rely. Also, unlike *Tekweld,* there was an 8-year period between the petition filing and the resumption of the petition processing. In addition, the undisputed evidence shows that for at least the last 3 years, no electricians have worked for the Employer performing work in the construction industry as requested by the petitioned-for unit. To grant the Petitioner's request to have an eligibility date of March 2012 would have the result of granting eligibility to individuals who have not been employed by the Employer for 8 years. If directing an election in this case, the Board's procedures would call for an eligibility date immediately preceding the date of the Decision and Direction of Election.

Based on the above, it is clear that prior to the blocking charge, the parties had not negotiated any of the terms of the election, including the eligibility date for voters. Additionally, the blocking charge in *Tekweld* was settled, and the election was delayed only 8 months from the time the parties initially executed their stipulated election agreement. In this case, the Petitioner filed the instant petition and then filed unfair labor practice charges resulting in the blocking of the petition for 8 years. As is raised by the Employer, I find the passage of eight years to be the type of circumstance requiring establishment of voter eligibility as of the time of resumption of the processing of the Petition, rather than by basing the date on the filing of the petition 8 years ago as is urged by the Petitioner. Using the resumption of processing of the petition as the timeframe to determine eligibility, and based on uncontroverted testimony and the application of the *Daniels/Steiny* formula, I further find there are no eligible voters in the

petitioned for unit. Accordingly, there is no basis to further consider the Petitioner's request and I am dismissing the petition.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that the Employer is engaged in commerce within the meaning of the Act, and it would effectuate the purpose of the Act to assert jurisdiction in this case.[4]

3. The parties stipulated that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

IV. ORDER

IT IS HEREBY ORDERED that the petition in this matter is dismissed.

[4] At hearing, the parties stipulated that the Employer, a corporation, with headquarters in Hanover, Maryland, provides temporary personnel and job screening services in various locations in a number of states, including its facility located at 310 Regency Parkway, Omaha, Nebraska, the only facility involved here. At its Omaha facility, it annually performs services valued in excess of $50,000 in States other than Nebraska.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the Executive Secretary of the National Labor Relational Board. This request must be received by the Board in Washington by **April 3, 2020**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 20, 2020

/s/ Lucinda L. Flynn

Lucinda L. Flynn, Acting Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
Saint Louis, Missouri